

Systemic Threat to the Rule of Law in Poland: What should the Commission do next?

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2016

'Without the full integral application of the Rule of Law across the EU, the European Union is doomed', Frans Timmermans at the European Parliament's plenary session on 25 October 2016

'We won't introduce any changes into Poland's legal system that are incompatible with the interests of the Polish state and its people and lack substantive grounds', Beata Szydlo, Polish Prime Minister, 27 October 2016

This post will examine the Polish government's refusal to implement [the recommendations adopted by the Commission](#) on 27 July 2016. Poland had three months to implement these recommendations in order to address the systemic threat to the rule of law identified by the Commission. The different options available to the Commission will then be briefly explored, the most dramatic of which is a possible recourse to [Article 7 TEU](#), the provision empowering EU institutions, under certain demanding conditions, to suspend inter alia the voting rights of the relevant national government in the Council of the EU.

1. Background

On 13 January 2016, for the first time ever, the European Commission announced that it would carry out a preliminary assessment of the situation of the Polish Constitutional Tribunal under the Rule of Law Framework, a new instrument it adopted in 2014 and the main features of which are briefly described [here](#) and critically analysed [here](#).

According to Frans Timmermans, First Vice-President of the European Commission, the primary justification for this unprecedented step was *'the fact that binding rulings of the Constitutional Tribunal are currently not respected'*, which *'is a serious matter in any rule of law-dominated state'*. The legislative changes adopted by the *Sejm* with respect to Public Service Broadcasters was the other justification put forward on the ground that democracy requires the protection of *'freedom of expression, freedom of assembly and respect of the rules governing the political and electoral processes'*.

In the absence of any concrete progress made by the Polish authorities to resolve its rule of law concerns, the Commission finally formalised them by adopting an [Opinion on 1 June 2016](#) (full text [available here](#)). Polish authorities were invited to submit their observations in response to the Opinion, and it was made clear to them that the Commission would move to Phase 2 of its Rule of Law Framework should its outstanding concerns not be *'satisfactorily resolved within a reasonable time'*.

In the continuing absence of any progress, the Commission finally adopted a [Rule of Law Recommendation on 27 July 2016](#) (full text available [here](#)). In the words of First Vice-President Frans Timmermans:

Despite the dialogue pursued with the Polish authorities since the beginning of the year, the Commission considers the main issues which threaten the rule of law in Poland have not been resolved. We are therefore now making concrete recommendations to the Polish authorities on how to address the concerns so that the Constitutional Tribunal of Poland can carry out its mandate to deliver effective constitutional review.

The Recommendation also explicitly gave Polish authorities three months to implement a total of five *'concrete recommendations'*, that is, by 27 October 2016. These five recommendations were as follows:

- The need for Polish authorities to respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015, which would mean inter alia that the judges nominated by the PiS-dominated legislature ‘without a valid legal basis do not take up the post of judge without being validly elected’;
- The publication and implementation in full of the judgment of 9 March 2016 of the Constitutional Tribunal, as well as all subsequent judgments, and ensures that the publication of future judgements is automatic and does not depend on any decision of the executive or legislative powers;
- To ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, and takes the [Opinion of the Venice Commission of 11 March 2016](#) fully into account; and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by new requirements, whether separately or through their combined effect;
- To ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect; and lastly
- To refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

2. Poland’s response

Rather than seeking to implement the European Commission’s recommendations and engage in a constructive dialogue with it, the Polish government instead quickly focused its energy on denying the legality of Commission’s Rule of Law Framework, with the leader of the ruling Law and Justice Party (hereinafter: PiS) threatening the Commission with an annulment action last May (see e.g. this [article](#) in *Politico*).

This threat was oblivious to the fact that neither the Rule of Law Opinion of 1 June 2016 nor the Rule of Law Recommendation of 27 July 2016 are, strictly speaking, legally binding acts. As such, they cannot be judicially challenged before the Court of Justice of the EU. Indeed, the whole point of the Commission’s Rule of Law Framework is to promote the resolution of relevant problems via a discursive approach. [Professor Kochenov and I](#) have actually criticised this very aspect on the basis that ‘a *confidential* dialogue coupled with the possibility of adopting *non-binding* recommendations’ was unlikely to enable the EU to successfully address the current phenomenon of ‘rule of law backsliding’ in the EU, with [exhibit A being Hungary](#).

As for the argument that the European Commission would allegedly overstep its mandate under the EU Treaties, this is a red herring. While it is true that according to an opinion of the Legal Service of the Council, the Commission’s pre-Article 7 Framework would allegedly not be ‘compatible with the principle of conferral which governs the competences of the institutions of the Union’, this opinion can be found both unpersuasive and ill reasoned. In a nutshell (for more details see [this article](#) by Prof Besselink), Article 7(1) TEU implicitly empowers the Commission to investigate any potential risk of a serious breach of EU values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. In other words, Article 7 TEU already allows the monitoring of EU countries prior to the determination of a serious breach of EU values given the obvious need for the Council to be able to rely on solid factual evidence before eventually finding against a ‘rogue state’. It follows that the powers of monitoring Member States with respect to Article 2 TEU values are inherent in the powers of the Council and the right of initiative of the Parliament, Commission and Member States under Article 7 TEU.

Be that as it may, the Polish government did not simply challenge the legality and legitimacy of the Commission’s rule of law actions. It has subsequently actively sought to further undermine the functioning of the Constitutional Court via the adoption of a new Act on 22 July 2016, as well as the independence of the Polish judiciary via intimidation and bullying tactics (on these different aspects, see Professor Kelemen’s [article](#) in Foreign Affairs and the posts published [on this blog](#) by Prof. Konciewicz of the University of Gdańsk and see also the shocking account given by Waldemar Żurek, a Polish district court judge and spokesperson of the Polish National Council of the Judiciary on [this blog](#)).

In another [Opinion dedicated to the situation in Poland](#) published on 14 October 2016 following the adoption of a

new Act relating to the Polish Constitutional Tribunal, the European Commission for Democracy through Law (a body of the Council of Europe also known as the Venice Commission) noted among other things that

Both the variety of legal interpretations and the absence of any reasoned reply to the President of the Tribunal by the Prime Minister reveal a serious problem of the rule of law. State organs took a political stance on an essential issue of constitutional law, conveyed this message via the media to the Constitutional Tribunal and did not even provide any formal reasoned reply to the President of the Constitutional Tribunal. (para. 93)

As far as the Parliament is concerned, the Venice Commission found that the Polish legislature, by including a provision declaring all rulings of the Polish Constitutional Tribunal since 9 March 2015 were issued in breach of the Act on the Tribunal, not only contradicts the Polish Constitution, it also means that

the legislature openly questions the position and authority of the Constitutional Tribunal as the final arbiter in constitutional issues. Like the purported exercise of such authority by the executive, rejecting the authority of a court in such a way flouts the principle of independence of the judiciary and constitutes another flagrant violation of the rule of law. (para. 98)

On the basis of the multiple and serious rule of law problems it identified, the Venice Commission concluded that

instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights (para. 128)

More recently, civil society groups from all over the world have called on the Polish President and Prime minister to implement the recommendations set out by the Commission in its Recommendation of 27 July 2016 (see summary [here](#) and full text of the letter [here](#) which notes among other things the 'numerous statements made by the representatives of the governing majority addressed to the Constitutional Tribunal and its judges' seeking to undermine 'the constitutional role of the Tribunal'. To understand what is likely to happen to civil society groups in Poland, see [this article](#) on Orbán's use of Russia's playbook to close down civil society space in Hungary).

3. Next possible step

In the [statement published on the website of the Polish Ministry of Foreign Affairs](#) on 27 October 2016, the MFA denounced the 'interferences into Poland's internal affairs' in violation of the principles of 'objectivism [sic], or respect for sovereignty, subsidiarity, and national identity.' The MFA further claimed that the Commission's rule of law recommendations reflect 'incorrect assumptions' deriving from 'incomplete knowledge about how the legal system and the Constitutional Tribunal operate in Poland', before concluding that the Commission's Recommendation of 27 July 2016 is 'groundless'.

One should note, in passing, that the Polish Government has used similar language and immature accusations with respect to the Venice Commission (the Polish government's 3-page position paper which described the Venice Commission's Opinion on the Act on the Constitutional Tribunal of 22 July as, among other things, 'unreliable' and 'one-sided' is available [here](#)). In a rather unprecedented episode, the three Polish 'December judges' (who were elected in violation of the Polish Constitution according to the case law of the Constitutional

Tribunal) refused to meet with the Venice Commission's delegation altogether: 'In a letter to the Commission, these judges stated that they do not trust the Venice Commission and that they believe that the meeting would serve as a legitimisation of another unjustified, biased and negative opinion against Poland' (Venice Commission Opinion of 14 October 2016, fn 6).

Considering the uncompromising stance (if not unnecessarily rude) adopted by the Polish government – the Prime minister [has recently stated](#) that her government would not introduce any of the 'politically motivated' changes recommended by the Commission – the Commission is now facing a difficult decision at a particularly complicated juncture in the history of the EU considering the multiple crises it now faces.

There is a bit of time left before a decision will have to be made by the Commission to address what Professor Sadurski has not unreasonably described as a '[constitutional coup d'état](#)'. The MFA statement cited above refers to a response communicated to the Commission which would demonstrate the absence of any systemic threat to the rule of law in Poland and which the MFA hoped, rather disrespectfully, will be 'understood' by the Commission. A decision by the Commission may then be expected following its assessment of the Polish government's response, which, regrettably, the Polish government did not deem useful to make public.

It is worth noting that the 2014 Communication on its Rule of Law Framework does not compel the Commission to act within a particular timeframe at this stage. Instead, it provides that the Commission ought to 'assess the possibility of activating one of the mechanisms set out in Article 7 TEU' in the situation where 'there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set' (which was 27 October 2016 in the case of Poland).

Time, however, is not on the Commission's side. As explained [here](#) by Maximilian Steinbeis, the editor of the *Verfassungblog*, the Polish government's Machiavellian plan is to bid for time until the term of office of the current President of the Constitutional Tribunal expires on 19 December 2016, at which point PiS will in all likelihood be able to install an ideologically compatible candidate to the Presidency. This would allow the appointment of the PiS 'December judges' before PiS gets the chance to decide on the identity of the current President's deputy, whose term is ending in June 2017. As noted by Maximilian Steinbeis, this may well convince Polish authorities to finally implement the Commission's recommendations. Indeed, with the 'capture' of the Constitutional Tribunal about to be completed, PiS would no longer have to worry about the Tribunal were it to issue 'materially unconstitutional laws'.

The Polish government's uncompromising stance can only but be explained by their confidence in [Hungarian support with respect to Article 7 TEU](#). It is on the basis of this promise of Hungarian support that Poland has most likely decided to call Brussels' bluff to quote [Henry Foy](#) from the Financial Times. There are indeed several difficulties with Article 7 TEU, which are well explored in [this piece](#) by Professor Scheppele, and in which she suggests in order to remove 'the fellow-traveller veto' to invoke Article 7(1) against *both* Poland and Hungary at the same time.

Considering the overwhelming evidence of a deliberate governmental strategy of systematically undermining all checks and balances in Poland as well the uncooperative behaviour of Polish authorities, the Commission has been left, in my opinion, with no other choice but to trigger Article 7(1) TEU. This is not to say that there is any realistic chance of seeing the Council adopting sanctions against Poland following the determination by the European Council, acting unanimously, of the existence of a serious and persistent breach by Poland of the values laid down in Article 2 TEU.

Triggering Article 7(1) TEU would however finally oblige national governments, meeting in the Council, to face up to their own responsibilities. It is not entirely impossible that four fifths of the Council's members, after obtaining the consent of the European Parliament, may agree to find that 'there is a clear risk of a serious breach' by Poland of Article 2. Before doing so, the Council could give Poland one last chance to comply with their Treaty obligations and implement the recommendations made by the Commission on 27 July 2016. The 'name and shame' and reputational costs associated with an unprecedented recourse to Article 7 TEU should not be underestimated, not to mention the significant [financial costs](#) on the borrowing front and the negative impact regarding FDI this might entail for Poland.

As for the argument that the EU would have more to lose than Poland by triggering Article 7 TEU, one may find it misguided. This is not to deny that it may be near impossible to secure unanimity in the European Council before the Council may eventually adopt sanctions against Poland. This would however squarely put the onus on the national governments. Not triggering Article 7(1) TEU, considering the body of evidence available against Poland, would by contrast seriously damage the authority of the Commission as the Guardian of the Treaties. Not acting would also seriously endanger the whole EU legal framework which, to quote the Court of Justice, 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU' ([Opinion 2/13](#), para. 168).

The Commission should also consider simultaneously initiating systemic infringement actions as suggested by Professor Scheppele [here](#), while national governments should stop hiding behind the Commission and resuscitate Article 259 TFEU as recommended by Professor Kochenov [here](#) (see in this respect [Sweden's recent threat to sue Hungary](#) over asylum refusals). There is little point however spending any time suggesting that Poland must be kicked out of the EU (see in this respect Luxembourg's call for Hungary to be thrown out of the EU for treating asylum seekers '[worse than wild animals](#)') considering the legal impossibility of doing so.

None of the above routes should furthermore prevent the EU from targeting '[the €14 billion Warsaw nets annually from the bloc](#)', as suggested by Alain Lamassoure, a French MEP. One of the many ironies of the current situation with Poland and Hungary is that both Orbán and Kaczyński have sought to rely on EU funds to entrench authoritarian regimes while blaming the EU for all sorts of ills. As [recently noted by two Green MEPs](#),

the same Viktor Orbán who runs roughshod over basic European democratic values, the rule of law and protection of minorities, will be the proud recipient of €25 billion between 2014 and 2020 – more than any other EU country on a per capita basis apart from Lithuania – and yet a large percentage of the Hungarian projects funded by the European Union are by research of Transparency International Hungary described as 'corrupt'.

It is time to put an end to this madness whereby the EU is indirectly subsidizing the establishment of two xenophobic and authoritarian regimes. As argued [here](#) by Professors Blauburger and Kelemen,

If European leaders are serious about defending democracy in the Union, they must start by taking a united stand in denouncing actions by fellow member governments that attack pluralist democracy and the rule of law, by suspending membership of those governments in their party groups in the European Parliament, and by threatening to put in place mechanisms to suspend the flow of EU funds to such governments.

I do appreciate the political difficulty of taking a decisive stance against the current Polish authorities at a time where PiS remains the most popular party in Poland, not least because of a generous social programme and a successful portrayal of external EU critics as '[fanatical multiculturalists and secularists who are furious that a traditionally oriented, non-politically correct governments in is control of Poland](#)'.

The consolidation of 'illiberal' regimes within the EU itself is however more likely to endanger it than any country withdrawing from it. One often reads that there are rule of law problems in other EU countries and one should not therefore single out Hungary or Poland. That there are rule of law problems everywhere cannot be denied but Hungary and Poland raise challenges of a completely different nature and importance. We are indeed dealing here with deliberate governmental blueprints to systematically weaken internal checks and balances with the view of dismantling the liberal democratic state and entrenching the long-term rule of one-party state (see e.g. this great piece by Ester Zalan on '[how to build an illiberal democracy in the EU](#)', which shows inter alia how slow the EU institutions have been to recognise what has been happening in Hungary). This is a decisive issue for the whole EU as these systemic violations of EU values not only affect the citizens of the relevant Member

State, they also affect EU citizens residing in these illiberal regimes as well as all EU citizens through Hungary and Poland's participation in the EU's decision-making process and the adoption of norms that bind all in the EU.

The national governments, meeting in the Council, have an historical responsibility to prevent any further rule of law backsliding in the EU and it is time for them to step up to their responsibilities to isolate, if not to sanction a member state whose authorities are actively seeking to dismantle liberal democracy in their country.

We just cannot afford to wait until the [new and sensible mechanism recently proposed by the European Parliament](#) (also known as the DRF pact, DRF standing for Democracy, Rule of law and Fundamental rights) is eventually established. By then, I am afraid, PiS would have most likely captured all national institutions and transformed Poland into an 'illiberal democracy', which not unlike the Soviet concept of 'popular democracy', would be democratic only but in name.

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SUGGESTED CITATION Pech, Laurent: *Systemic Threat to the Rule of Law in Poland: What should the Commission do next?*, *VerfBlog*, 2016/10/31, <http://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/>.